No. 76-1310

In the Supreme Court of the United States

OCTOBER TERM, 1977

THOMAS L. HOUCHINS,

Petitioner,

vs.

KQED, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR KEARNS-TRIBUNE CORPORATION AS AMICUS CURIAE

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 546 F.2d 284 (1976). The Findings of Fact and Conclusions of Law of the District Court are not officially reported.

JURISDICTION

The judgment of the Court of Appeals was dated

and filed November 1, 1976. A Petition for Rehearing was thereafter filed and denied. The Petition for a Writ of Certiorari was filed March 22, 1977, and the Petition for a Writ of Certiorari was granted May 23, 1977.

This Court has jurisdiction to review the judgment in question of the Court of Appeals pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution reads in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech or of the press; . . . .

QUESTION DISCUSSED BY AMICUS CURIAE

Kearns-Tribune shall restrict its argument to the question of whether limiting press access to prisons to the same standard of access accorded the public at large when there is no compelling state interest for restrictions on press access allows the state a power of prior restraint and censorship.

INTEREST OF KEARNS-TRIBUNE CORPORATION

Kearns-Tribune Corporation is the owner and publisher of *The Salt Lake Tribune*, a newspaper published seven days a week. *The Salt Lake Tribune* is one of two major newspapers published in Salt Lake City, Utah. It is distributed throughout the State of Utah and portions

of surrounding states. Kearns-Tribune Corporation has an interest in this case because of its general interest in the protection of the rights accorded the press under the First Amendment and because of its interest in providing proper news coverage to conditions that exist in local prisons and newsworthy events which occur there. Kearns-Tribune Corporation also has an interest in this case because of its potential effect on litigation in which it is engaged concerning the right of access to death row prisoners and the right to have a reporter present at an execution.

The decision of this Court in the case at bar is likely to have a siginificant effect on these cases. Kearns-Tribune Corporation has pending in the United States District Court for the District of Utah an action challenging the right of the State of Utah to exclude entirely newspaper reporters from interviewing inmates who have been condemned to death and are housed on death row at the Utah State Prison. This litigation is styled "*Kearns-Tribune Corporation a/k/a The Salt Lake Tribune vs. Utah Board of Corrections, et al.*, Civil No. C-76-372. A temporary restraining order was vacated by the Court of Appeals for the Tenth Circuit *sub nom.*, *Utah Board of Corrections, et al. v. Honorable Chief Judge Willis W. Ritter*, 76-2087 (dated December 7, 1976).[1]

Kearns-Tribune Corporation also has pending in the Court of Appeals for the Tenth Circuit an appeal from a decision of the United States District Court for the

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[1] An application for a stay of the Court of Appeals' order was denied by this Court on a 7-2 vote, *Kearns-Tribune Corp. v. Utah Board of Corrections, et al.*, Case No. A-488, December 17, 1976.

District of Utah which sustained the constitutionality of a Utah statute, Section 77-36-18, *Utah Code Annotated* (1977 Supp.) which excludes newsmen from witnessing the execution of a convict condemned to death. That case, *Kearns-Tribune Corporation, a/k/a The Salt Lake Tribune, et al. vs. Utah Board of Pardons, et al.*, No. 77-1213, has been briefed but not argued.

However, the interest of Kearns-Tribune Corporation in this amicus brief is not to deal in any way with the facts of the above two cases to which it is a party. Rather, it is our purpose to address the main issues in the instant case: whether press access to prisons is in all cases limited by the extent of the general access accorded the public and whether press access may be limited without compelling reasons.

STATEMENT

In view of the parties' full presentation of the facts in this case, we shall not undertake to deal with them except to comment briefly upon the decision of the court below which sustained the position of KQED, Inc.

The court below sustained the issuance of the trial court's preliminary injunction which prohibited the Sheriff of Alameda County, California, from denying media representatives full and accurate coverage of jail conditions "at reasonable times and hours . . ." (546 F.2d at 285). The three judges of the panel of the Ninth Circuit which heard the case were apparently uncertain as to the degree to which this Court's decisions in *Pell v. Procunier*, 417 U.S. 817 (1974) and *Sarbe v. Washington Post Co.*, 417 U.S. 843 (1974), should be extended beyond the particular facts in those cases. Each wrote a separate opinion, but each concurred in affirming the order of the lower court, although on different grounds.

District Judge Pregerson, sitting by designation, was of the opinion that the trial court's Memorandum in support of the preliminary injunction rested upon a finding that the First Amendment rights of both the public and the news media were infringed by the restrictive policies of the Sheriff of Alameda County (546 F.2d at 286). This view of the law would have the effect of enlarging the public's rights of access to prison facilities as well as that of media representatives.

Circuit Judge Duniway stated a belief that the preliminary injunction could not be squared with this Court's decisions in *Pell* and *Sarbe*, but stated (546 F.2d at 294):

> I happen to believe that, as to most issues of public importance, and assuming that one accepts the media-created notion that there is such an animal as a constitutionally protected 'public's right to know' and further assuming that the media somehow embody that 'right,' then the media have a protected preferred right to access to information about the public's business. This is based on the proposition that, in our modern, urban, overpopulated, complex and somewhat intimidating and alienated society, only the media, as distinguished from the submerged, often alienated, and often frightened, individual, can be counted on to dig out and disseminate the facts about about the public's business. Witness 'Watergate' and its remarkable consequences.

Pursuant to this view, Judge Duniway then observed (546 F.2d at 295):

> It seems to me to be obvious that regulations governing media access to a jail, assuming that the media have a right, along with the public, to such access, must differ from regulations governing access by the public at large. It is one thing to say that representatives of the media, who are not numerous and who can readily be screened, should be able to interview inmates, take pictures, etc., and quite another thing to say that any one of the several million inhabitants of the San Francisco Bay Area or any one of the million or so inhabitants of Alameda County, should have the same rights. The administrative problems posed by the two are obviously different, and the law ought to recognize the differences. But as I read *Pell, supra*, and *Washington Post, supra*, those cases far from recognizing these differences, expressly disregard them.

Circuit Judge Hufstedler approached the problem from a somewhat different angle. She stated (546 F.2d at 295):

> Two separate, but related questions are involved: (1) What kind of information about prisons and prisoners does the public have a right to know? or to put the question differently, from what kind of information about prisons and prisoners should the public be excluded? (2) What kinds of limitations can be imposed on the public and on the news media upon the means by which the information to which the public is entitled can be gathered?

Because of the different administrative problems which arise out of the difference in making prison facilities accessible to the press compared with making them accessible to the public as a whole, and based on the premise that the media are entitled to information concerning the prisons, Judge Hufstedler found that the district court's injunction was consistent with the teaching of *Pell* and *Saxbe*.

ARGUMENT

This Court has on several occasions recognized that news gathering is entitled to protection under the First Amendment. News gathering necessarily entails conduct, which, except to the extent it serves as a necessary vehicle for news gathering, would not be entitled to First Amendment protection. Nevertheless, there has been increased recognition that a viable and vigorous press must be accorded some constitutional protection in its news gathering activities, and this Court has referred with increasing frequency to the proposition that such activities are covered by the First Amendment.

Zemel v. Rusk, 381 U.S. 1 (1965) was the first case in which this Court commented on the topic. The Court stated (*Id.* at 17): "The right to speak and publish does not carry with it the *unrestrained* right to gather information" (emphasis added). By the careful use of the term "unrestrained," the inference was clear that the gathering

of information is entitled to at least some constitutional protection.

This principle was stated more clearly and explicitly in *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). The Court stated:

> Nor is it suggested that news gathering does not qualify for First Amendment protection; *without some protection for seeking out the news, fredom of the press could be eviscerated* (emphasis added).

Recognition of this principle was also repeated in *Pell v. Procunier*, 417 U.S. 817, 833 (1974).

The importance of extending constitutional protection to news gathering activities need hardly be labored. It need only be stated that if the public and the press are both denied access by governmental restrictions to information and news sources concerning vital public issues, the restraint on the press is far more extensive and complete than any prior restraint. Publication of prohibited material might occur despite legal sanctions; it is self-evident that information will not reach the public when there is a total news blackout under the guise that the government is merely regulating conduct. As Mr. Justice Black stated in *New York Times Co. v. United States*, 403 U.S. 713, at 724:

> Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and

> wide-open' debate. For that reason, this Court has taken a strong stand against prior injunctions forbidding publication of certain matter.

In *New York Times Co. v. United States, supra*, the Court held injunctions against publication of material allegedly damaging to the national security interests unconstitutional. The Court reemphasized the repugnancy of prior restraints in stating, (403 U.S. at 714):

> 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity' *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70.

In *Near v. Minnesota*, 283 U.S. 712, at 714, the Court noted that prior restraints may be effectively imposed by both the executive and the legislative branches, in addition to the judiciary. The Court stated:

> Here, as Madison said, 'The great and essential rights of the people are secured against legislative as well as against executive ambition. These are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. The security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also.' 'Report on the Virginia Resolutions,' *Madison's Works*, Vol. 4, p. 543.

Recognizing that unofficial and indirect prior restraints may achieve an inhibition of publication similar to direct prior restraints, this Court has revised the law of libel by

abolishing the principle of strict liability because of the naturally self-censoring effect that it has upon the press in printing news necessary to the public decision-making process, *New York Times v. Sullivan*, 376 U.S. 254 (1964); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Associated Press v. Walker*, 338 U.S. 130 (1967); *Gertz v. Robert Welch*, 418 U.S. 323 (1974). In a similar vein, *Smith v. California*, 361 U.S. 147 (1959) held that a bookseller could not constitutionally be held strictly liable for selling obscene material because of the tendency to induce self-censorship of constitutionally protected material.

As noxious as a system of prior restraints is to First Amendment values, such a system is not as repugnant to the First Amendment as the complete suppression of news at the source, or a partial disclosure by press release, which is not subject to verification. Even if the government releases some information, the lack of verifiability makes possible the manipulation of the news and public attitudes. If prior restraints bear a heavy presumption against their constitutionality, the power to completely suppress access to news which has no facial justification for confidentiality ought also to receive close judicial scrutiny.

It is at least possible that the conditions which existed at Dachau and Auschwitz in Nazi Germany could not have existed had there been public knowledge concerning the activities carried on in those infamous places. Certainly information concerning the nature of the penal system in the United States, including prison conditions, types of disciplinary actions, and the humaneness of executions is information which is fit for public dissemination and cries out for greater public enlightenment and discussion. Clearly, government regulations which simply prohibit or severely restrict public and press access to information which may be of the highest public importance ought not to be justifiable on the same basis as regulations governing simple conduct, *i.e.*, a presumption of constitutionality.

In light of these authorities and the facts of the instant case, which show an official intent to manipulate the rules governing both public and press access to the Alameda County jail, we submit that it would be highly subversive of a free press attempting to expose conditions having high public importance to permit public officials to deny the press and public access to such conditions.

Given the facts of this case, which reveal an official manipulation of public access with a concommitant manipulation of press access amounting to prior restraints, we submit that this case cannot be decided, as the petitioner contends, on the basis of a wooden formula, i.e. that the press is entitled to no greater access than the public generally. The words of Justice Powell in *Saxbe v. Washington Post Co.*, 417 U.S. 843, at 860, are particularly pertinent here:

> At some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that is both appropriate and necessary to require the Government to justify such regulations in terms more compel-

ling than discretionary authority and administrative convenience.

The petitioner in this case would have this Court dispose of this case on the basis that "KQED has no greater right of acces to information than the right possessed by the general public" (Petitioner's Br., p. 12). Petitioner relies primarily upon this Court's decisions in *Pell v. Procunier, supra,* and *Saxbe v. Washington Post Co., Inc., supra,* to support its conclusion. We respectfully submit that this Court's decisions in *Pell* and *Saxbe* do not compel the result contended for by petitioner.

The specific issue in both *Pell* and *Saxbe* was whether newsmen had a constitutional right under the First Amendment to single out specific inmates for the purpose of seeking to interview them. This limited contention arose in a factual context far different from the instant case. In neither *Pell* nor *Saxbe* was there any indication whatsoever of any intention to suppress any news concerning prison conditions or treatment of inmates. Indeed, the facts disclosed an openness and freedom of access which contrasts sharply with the facts recited in Respondents' Brief.

In *Pell,* the Court noted (417 U.S. at 830):

> We note at the outset that this regulation is not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions. Indeed, the record demonstrates that, under current corrections policy, both the press and the general public are accorded full opportunities to observe prison conditions. [Footnote omitted]. The Department of Corrections regularly conducts public tours through the prisons for the benefit of interested citizens. In addition, newsmen are permitted to visit both the maximum and minimum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter. If security considerations permit, corrections personnel will step aside to permit such interviews to be confidential. Apart from general access to all parts of the institutions, newsmen are also permitted to enter the prisons to interview inmates selected at random by the corrections officials. By the same token, if a newsman wishes to write a story on a particular prison program, he is permitted to sit in on group meetings and to interview the inmate participants. In short, members of the press enjoy access to California prisons that is not available to other members of the public.

The Court also noted a similar degree of access in *Saxbe*, see 417 U.S. at 847-848.

In short, it is clear, as the Court specifically found, that the prison visitation policies in both cases were not designed to "conceal from the public the conditions prevailing" in the prisons (417 U.S. 830, 848).

The language in *Pell* and *Saxbe* which defines the scope of constitutionally protected access of the press in its news gathering activities in terms of general public access to sources and information, lends itself to the proposition that government may control press access by the simple expedient of controlling public access. The Court

has not made clear, however, whether governmental regulation of public access in all cases may be justified solely on the basis of a presumption of constitutionality or whether a more compelling justification must be made. If regulation of press and public access may, in the end, be justified on the ground that the regulation is reasonable, irrespective of the interest of the informational interests of the public, balanced against the government interest in withholding access, then government is accorded a power to control and tailor the amount and content of information in a manner which simply ignores First Amendment values. In the context of this case, the consequences would be to accord the Sheriff of Alameda County the power to refuse all access—both public and press—to the Alameda County jail even in the absence of a strong reason supporting such a restriction.

In the instant case there is no evidence of such openness to the public and to the press as existed in *Pell* and *Saxbe*. The limited restriction on press access in *Pell* and *Saxbe* to individual inmates, which prohibited singling out individual inmates for interviews, was justified in those cases on the basis of a factual showing that such interviews would "spawn serious discipline and morale problems" "by hostility and resentment" (417 U.S. at 849), and on the additional ground that particular press attention to individual inmates tended to be concentrated on a small number of inmates who as a result became "big wheels" with a disproportionate degree of notoriety and influence in the prison confines, (417 U.S. at 831, 848-849). In the instant case, however, the Petitioner does not argue that the relief granted by the trial court would re-

sult in any such disciplinary problems or a threat to the rehabilitation program. The Petitioner in its brief in this Court simply argues that the equal access rule ought to be mechanistically applied in this case.

Petitioner also contends that the District Court erred in failing to properly balance KQED's rights of access against the Sheriff's concerns. (Petitioner's Br. pp. 19-20). The Petitioner relies upon *United States v. O'Brien*, 391 U.S. 367 (1968) for the proposition that when speech and non-speech elements are combined in a course of conduct, an important governmental interest in regulating the non-speech elements can justify incidental limitations on First Amendment freedoms (Petitioner's Br. p. 20). The Court stated in *O'Brien* (391 U.S. at 376-77):

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inhears in these terms, we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the interest. [footnotes omitted].

We agree that this type of analysis is appropriate in

access cases. We do not believe that this analysis justifies the restrictions on press access to the Alameda County jail imposed by the Sheriff. Neither of the lower courts found that the restriction of press access to guided tours as imposed by the Sheriff in this case is "no greater than is essential to the furtherance" of a legitimate governmental interest (ibid). Nor did they find a "compelling" or "paramount" penal purpose in the restrictions.

Of course in all access cases, there is an intermingling of conduct with protected First Amendment activity. After all, conduct is an indispensable vehicle for exercise of First Amendment rights. Thus, there is a necessity of balancing the governmental interests in regulating conduct with the First Amendment protected activity, as illustrated by *United States v. O'Brien, supra.* Any other approach would, we submit, make meaningless the statements by this Court that news gathering enjoys First Amendment protection.

In *Branzburg v. Hayes,* 408 U.S. 665, at 700-701, the Court engaged in just such a balancing of interests. The Court considered whether compelled disclosure of a reporter's sources was of sufficient important to law enforcement to outweigh the chilling effect on news gathering which results from forced disclosure. The Court struck the balance in favor of the state's interest in law enforcement.

Different results have been achieved, however, in civil cases with respect to disclosure of confidential sources on the ground that the governmental interests at stake do not

outbalance the interests of the press in news gathering activities. *Baker v. F & F Investment,* 470 F.2d 778 (2nd Cir. 1972); *see also United States v. Liddy,* 478 F.2d 586 (D.C. Cir. 1972). In *Baker* the Court stated that *Branzburg* had applied traditional First Amendment doctrine, "which teaches that constitutional rights secured by the First Amendment cannot be infringed absent a 'compelling' or 'paramount' state interest"... (470 F.2d at 784). The court in *Baker* held that there was no compelling reason in a civil case to justify the restraints placed upon news gathering activities by a compelled disclosure of confidential news sources.

This Court has recognized that prison conditions are of overriding public concern. In *Pell v. Procunier,* the Court noted that the general openness of the policy with respect to press and public access in that case reflected a "recognition that the conditions in this Nation's prisons are a matter that is both newsworthy and of great public importance. As the Chief Justice has commented, we cannot 'continue . . . to brush under the rug the problems of those who are found guilty and subject to criminal sentence . . . . It is a melancholy truth that it has taken the tragic prison outbreaks of the past three years to focus widespread public attention on this problem' " (417 U.S. at 830, n. 7).

The most effective remedy for enlisting greater public concern for problems arising in our penal system and for remedying injustices that exist there, is greater publicity. This Court, quoting from Jeremy Bentham in *In Re Oliver,* 333 U.S. 257, at 271 (1948) stated the importance of publicity with respect to the proper admin-

istration of the judiciary in language that is equally applicable in this case:

> 'Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.

The importance of public scrutiny of governmental operations finds particular application in the Sixth Amendment guarantee that criminal trials be public. Given the wide array of checks against arbitrary and improper conduct in judicial proceedings which the judiciary provides, the reliance of the founding fathers upon publicity as such an important check underlines the fact that in the operation of prisons, publicity is all the more important. We recognize, of course, that exigent conditions may on occassion require strict regulation of public and press access to prisons. However, in the normal course of events, in a practical and realistic sense, publicity can be given to prison problems and the public enlightened only if the press has access to such institutions. We believe that Judge Duniway, in the Court below, was quite right in stating that the media's preferred right to access to information about public business is based on the foundation that "in our modern, urban, overpopulated, complex and somewhat intimidating and alienated society, only the media, as distinguished from the submerged, often alienated, and often frightened, individual, can be counted on to dig out and disseminate the facts about the

public's business. Witness " 'Watergate' and its remarkable consequences" (546 F.2d at 294). This comment is particularly applicable to conditions existing in the nation's prisons.

In sum, news gathering is as indispensable to a free press as is the act of publication itself. In terms of overall First Amendment values, the right to gather news with respect to issues as to which the public should be informed is of overriding importance because it is primarily the newspapers and other media which focus the attention of the public on issues of critical importance. We do not believe that the necessary constitutional protection for news gathering can be accomplished by a mechanistically applied rule that the press has no special access beyond that accorded the public generally. In a very real sense, the press serves as the agent for the public, and that was apparently the intent of the founding fathers in giving constitutional protection to a primarily private activity and institution. We, of course, recognize that there are many areas in which the government has a legitimate interest in precluding access to sources and information. But this Court's decisions in the *Pell* and *Saxbe* cases stand for the proposition that the Nation's prisons cannot be placed under a cloak of partial or complete secrecy. On the contrary, the conditions in the prisons are of the utmost public importance, and press access to them must have some constitutional footing. From the facts in this case there has been no showing of a "compelling" state interest to justify the strict limitations placed upon press access, and those limitations were properly repudiated by the courts below.

CONCLUSION

For the foregoing reasons we submit that the judgment of the Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED,

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